ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20054

In the Matter of	)	
	)	
Internet Telephone	)	Rulemaking # 8775
	)	
	)	

REPLY COMMENTS OF

AMERICA'S CARRIERS TELECOMMUNICATION ASSOCIATION ("ACTA")

Reply Comments: June 10, 1996

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I. EXECUTIVE SUMMARY

Internet telephony presents a challenge to the telecommunications industry which, if not intelligently managed, poses a real threat to the efficient provisioning of telecommunications in the United States and a direct harm to the public interest. America's Carriers Telecommunications Association's ("ACTA's") petition asks nothing more of the Federal Communications Commission ("FCC" or "Commission") than to obey the mandates of the Communications Act of 1934 ("1934 Act") and the Telecommunications Act of 1996 ("1996 Act"). The FCC can ill afford to delay a decision in the instant rulemaking. Technological developments and restructuring in the telecommunications industry are occurring at a breathtaking pace. If the FCC chooses to delay acting on ACTA's petition, it will have acted with a disregard for the realities of the telecommunications market and abdicated its statutorily imposed role.

Section II of ACTA's reply comments provide an update on events in Internet telephony since ACTA filed its petition on March 4, 1996 and its initial comments on May 8, 1996. In less than one month's time, Internet telephony services have gone from being offered by small entrepreneurial software producers to industry giants such as AT&T, Microsoft, Netscape, America On-Line and Compuserve. In that same time period, technologies have emerged which permit interoperability of telephony software thus eliminating one of the limitations--the necessity that both parties to an Internet phone call use the same software--of Internet telephony. These developments clear the way for wide-spread telephony over the Internet. Moreover, growing competition in the Internet access arena is producing offerings of "unlimited" monthly Internet access. These offerings, combined with high demand, will further burden the traditional switched network which carries Internet traffic. Indeed, Internet users' habit of "nailing-up"--staying on line for hours at a time--can only be encouraged by such service offerings. Reports

abound of traditional users of the switched access infrastructure being unable to make phone calls due to excessive traffic on local lines. Likewise, the Internet is plagued by congestion to the degree that some observers predict an Internet crash before the end of this year. Thus, the Commission must act, in the public interest, to address these realities and provide a framework wherein the transition of the telecommunications infrastructure is intelligently managed to the benefit of all.

The telecommunications industry voiced its support for ACTA's petition in comments filed with the FCC on May 8, 1996. Regional Bell Operating Companies ("RBOCs"), the United States Telephone Association ("USTA"), long distance carriers and others argued strenuously that the enhanced service providers ("ESP") exemption does not apply to the provisioning of voice communications over the Internet. Insulating ITSPs from access charges for the provisioning of basic service is a misapplication of the ESP exemption. This misapplication not only creates cost and pricing disparities between ITSPs and traditional carriers but drains revenue from funds which ensure universal service and the maintenance of the nation's telecommunications infrastructure. ACTA maintains that ITSPs, when provisioning basic service, are obligated to pay access charges. Likewise, ACTA urges the Commission to revisit the ESP exemption and consider whether, in light of the maturation of the enhanced services industry, this policy is justifiable.

In section III of its comments, ACTA points out that, contrary to what some commenters claim, the Commission has jurisdiction to regulate telephony over the Internet. The Internet is not exempt from regulation under the 1996 Act. In fact, a provision exempting the Internet from

any regulation was considered and removed by Congress in conference. Thus, those who suggest that the FCC has no jurisdiction over the Internet under the 1996 Act are simply wrong.

ACTA has outlined the Commission's jurisdiction over telephony under statute and case law. Additionally, the Commission has jurisdiction over Internet telephony under the Southwestern Cable decision. The Commission's jurisdiction over matters affecting the nation's telecommunications infrastructure is well-established and ACTA demonstrates that the elements of the Southwestern Cable three prong test are satisfied.

ITSPs and some commenters maintain that the Commission has no jurisdiction over software producers because they do not provide transmission services or facilities to the public. ACTA sees this contention for what it is--a red herring. Switchless long distance resellers provide neither transmission services nor facilities to the public yet they are regulated as telecommunications carriers. ACTA laid out the legal test for common carrier treatment in its initial comments: that one holds oneself out as offering to the public telecommunications services for a fee. ITSPs have made such an offering to the public. Commenters' contention that ITSPs are only offering software is disingenuous at best. ITSPs' advertisements offer "long distance" services to the public. By their very actions, ITSPs hold themselves out to the public as providing communications services and thus are common carriers.

ACTA maintains that the FCC has jurisdiction over ITSPs, a group which now includes long distance telecommunications and on-line service providers, and is obligated by statute to regulate their provisioning of telephony services over the Internet. If the Commission refrains from exercising its jurisdiction and enforcing the law, ACTA requests that such a decision be

made on the record, including an explanation of the underlying rationale for such decision.

II. UPDATE

A. RECENT DEVELOPMENTS IN INTERNET TELEPHONY

The growth of Internet telephony and voice communications since ACTA filed its petition on March 4, 1996 is evident. As ACTA noted in its initial comments filed May 8, 1996, Fortune 500 companies such as Microsoft, AT&T and IBM and the largest on-line service providers, America On-Line and Compuserve, have announced their intention to provision telecommunications services over the Internet. These developments add force to ACTA's contention that Internet telephony is not only a viable alternative to plain old telephone service ("POTS"), but is currently being described and hyped as the alternative to telephone service, posing a phenomenon the Commission can ill afford to ignore.

ACTA's petition and the issues it raises do not, therefore, address a fledgling industry. Internet access and on-line services represent one of the fastest growing industries in the United States. Nor does ACTA's petition address a new technology. Packet switching technology has existed for over three decades. Neither is ACTA's petition premature nor intended to unduly impede the proper continued growth and development of the Internet or, more accurately, the alternative technology on which the Internet is based.

Commenters who suggest that it is "too early" to regulate voice communications over the Internet ignore the inherent reality of the rapid pace of technological development in the telecommunications marketplace. Only weeks after ACTA filed its petition, Microsoft and Intel announced a platform of industry standards-based voice communications over the Internet.

Netscape Communications Corp. introduced a web browser which provides interoperability of telephony software.[1] Microsoft and Netscape control nearly 100% of the Internet web browser market and clearly have the resources to carry through on their announcements and plans.

Then, too, the limitations of Internet telephony software which were present when ACTA filed its petition (i.e., users had to use the same software in order to facilitate Internet phone calls) have evaporated as the following partial list of developments of Internet telephony underscores:

- Microsoft is developing technology to allow widespread use of the Internet for unlimited long distance phone calls.[2]
- Netscape Communications Corp. released a web browser supporting interoperable Internet telephony and videoconferencing. "Netscape LiveMedia" is a standards-based initiative designed to provide a common platform for multimedia applications facilitating real-time audio and video communications between Internet users who are using different software and hardware.[3]
- Northern Telecom Ltd. announced plans to offer telephone handsets that access the Internet. The company will "incorporate Sun [Microsystem]'s microprocessors

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[1] *Latest Netscape Web Client Hosts Internet Telephony, Multimedia Applications*, BNA Electronic Information Policy & Law Report, May 10, 1996, at 111.

[2] *Hello, Ma Bell? Please Hold for Ma Net.* Seattle Times, May 30, 1996, at E1.

[3] *Latest Netscape Web Client Hosts Internet Telephony, Multimedia Applications, supra*, note 1.

and software in phones intended to be a new class of inexpensive Internet 'appliances.'"[4]

- Intel Corp. plans to introduce video teleconferencing with personal computers. Intel is developing an Internet-based version of the video teleconferencing product. Internet teleconferencing is available already and "offer[s] the advantage of providing toll-free calling anywhere in the world. By contrast, Intel's system, which uses regular phone connections, requires paying long-distance charges."[5] (Emphasis added);
- AT&T announced that it would offer Internet telephony services and five free hours of Internet access per month for one year to customers who use at least one hour of AT&T's WorldNet service per month. AT&T also offers unlimited Internet access for $19.95 per month to its long distance customers. AT&T's entry into the Internet access arena, like the merger of MFS and UUnet, is further evidence of the restructuring of the telecommunications industry and the viability of Internet telephony.[6]
- PacBell announced its offer of unlimited Internet access to customers in California for $19.95 per month. PacBell engineered its telephone network to handle the

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[4] *Northern Telecom Will Use Java Technology in Phones*, Wall Street Journal, May 23, 1996, at B3.

[5] *Intel to Introduce a Low-Cost System for Video Teleconferencing with PC's*, Wall Street Journal, May 30, 1996, at B16.

[6] Advertisement, Wall Street Journal, May 29, 1996, at B9. In section II D of these comments, ACTA will discuss some of the competitive and consumer implications of AT&T's announcement.

Internet traffic and is ready "to double or triple that should [it] need to." PacBell is offering a free month of service to its customers and special pricing for high-volume users. High-volume users receive 20 hours per month for $14.95. Each additional hour of usage costs 50¢ up to a maximum of $19.95. If the high-volume customer reaches the $19.95 rate, the offer of unlimited service applies and, according to a PacBell spokesman, "[e]ven if you never hang up the phone it's still just $19.95." Other RBOCs, including Ameritech, Nynex, BellSouth and U.S. West, intend to offer Internet access in late 1996 or early 1997. Sprint intends to offer Internet access this summer.[7]

- LCI International Inc., the nations sixth-largest long distance carrier, announced its plans to offer business customers Internet access.[8]

These developments, following the numerous ones already cited by ACTA in its initial comments, indicate that the issues raised are neither premature nor speculative. To the contrary, these developments underscore that the time has come for the Commission to devise policies and programs to manage the rapid transition of the traditional communications infrastructure. If the Commission does not act, it will be abdicating its authority and duty to ensure the availability of advanced telecommunications services to all Americans and to provide for the sustained growth of the National Information Infrastructure ("NII")

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[7] *PacTel to Become First Regional Bell to Offer Unlimited Access to Internet*, Wall Street Journal, May 28, 1996, at A3. ACTA finds PacBell's announcements at odds with its concerns, expressed in its May 8, 1996 comments. *See*, initial comments of Pacific Bell and Nevada Bell, at iii. It was PacBell who used or coined the phrase "nailed up" to describe Internet users remaining on-line for indefinite periods. Id.

[8] *LCI to Offer Firms Internet Access*, Washington Post, May 30, 1996, at D10.

B. DEBUNKING INTERNET MYTHS

Contrary to the overstated assertions of those who fear any potential incursion into their assumed private Internet domain, regardless of all other interests but their own, ACTA's petition does not ask the Commission to "regulate the Internet." First and most simply, ACTA's petition asks the Commission to enforce the law. The FCC's fundamental mission is to regulate and manage telecommunications in the public interest. The 1934 Act states:

> [f]or the purpose of regulating interstate and foreign commerce in communications by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world wide wire and radio communication service with adequate facilities at reasonable charges . . . there is created a commission to be known as the 'Federal Communications Commission,' which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.[9]

(Emphasis added.)

The fact that telecommunications may have already begun a migration from the traditional infrastructure to a new one does not alter the Commission's obligations under the law. If, as some suggest, the Internet will supplant the traditional telephone network as the nation's future communications vehicle, the Commission is nevertheless charged with overseeing and managing the transition, means and methods involved in doing so.

The Commission cannot ignore the plain facts. First, ITSPs use the traditional telephone infrastructure to provide basic service to Internet users. Second, such usage comes at a cost. Third, the users of today's traditional infrastructure, some more than others, pay those costs. ITSPs' contributions to cover those costs, if any, are not comparable to those of similarly situated telecommunications providers. The Commission's own rules concerning access charges and

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[9] 47 U.S.C. § 151 (1934).

universal service have imposed costs on telecommunications carriers who use the telephone infrastructure to provision basic service. These rules are designed to maintain the communications infrastructure and assure the provisioning of telecommunications services to all Americans. ITSPs avoid such costs under the guise of the ESP exemption. However, the ESP exemption was never intended to apply to the provisioning of basic voice communications service.

Commenters who argue that the Internet should remain "unregulated" also choose to ignore the implications of the rapid and explosive transmutation of the Internet into a commercial network wherein an unlimited amount of goods and services are or can (and will) be sold. Moreover, the Internet itself is marketed as a product (e.g., in the form of "Intranets" which are offered to businesses for internal communications). At this time also, federal and state agencies and the courts are engaged in defining and applying rules to Internet commerce and communication. For example:

- Several states are drafting legislation to impose sales, use and gross receipts taxes on Internet users and Internet Service Providers ("ISPs")[10];
- The Federal Trade Commission is promoting guidelines for Internet advertisements consistent with consumer protection laws[11];
- Georgia passed the "Georgia Computer Systems Protection Act" which criminalizes the transmission of misleading data over the Internet. The purpose of the statute is to protect Internet users from being intentionally defrauded by the

[10] *Shaking Down the Net*, U.S. News & World Report, June 10, 1996, at 60.

[11] *Curbs on Cyberspace Ads Proposed*, Washington Post, June 5, 1996, at F1.

misuse of certain information, including trademarks, placed on a web or e-mail address;

- Internet "domain" names have become the subject of trademark disputes. Domain names indicate the origin of goods and services and the attendant expectations of quality and reliability. Accordingly, companies with federally protected trademarks have initiated lawsuits to enforce their intellectual property rights against holders of domain names which allegedly infringe on their trademark.[12]
- Copyright owners whose protected expressions have been published on the Internet without permission have sought legal redress and been upheld in the courts.[13]
- A GAO report on hacker attacks against Department of Defense computers noted an incident of more than 150 incursions into an Air Force laboratory via the Internet. Passwords collected from these incursions allowed the hackers to invade more than 100 other computers via the Internet. The hackers used one of the passwords to enter a nuclear-research facility in South Korea. The Senate Permanent Subcommittee on Investigations recommended the establishment of an international computer crime bureau to respond to Internet security threats posed by computer hackers[14];

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[12] Roadrunner Computer Systems, Inc. v. Network Solutions, Inc., No. 96-413A (E.D. Va. filed March 26, 1996)

[13] Religious Technology Center v. Arnaldo Pagliarini Lerma, Digital Gateway Systems, The Washington Post, Marc Fisher, and Richard Leiby, No. 95-1107-A (E.D. Va filed August 11, 1995)

[14] *Pentagon Hacker Attacks Increase and Some Pose Threat, GAO Says*, Wall Street Journal, May 23, 1996, at B3; *U.S., Private Computers Vulnerable to Attacks by Hackers, Study Says*, Washington Post, June 6, 1996, at D9.

- "Cyber" terrorists have extorted up to 600 million dollars worldwide by threatening to disable computer systems. These terrorists target banks, brokerage firms and investment houses and have executed more than 40 attacks on financial institutions in London and New York since 1993. The FBI has set up three units to investigate computer extortion and Scotland Yard is participating in a Europe-wide initiative to catch "cyber" criminals [15]

Foreign jurisdictions are also addressing public policy concerns posed by the explosion of Internet usage and proposing legislation to regulate various aspects of Internet commercial activity[16]:

- The European Parliament is attempting to apply broadcasting laws to the Internet and commercial on-line services[17];
- Canadian regulators are asking an Ontario-based Internet company to pay access fees to telephone companies[18]

Fundamentally, ACTA's petition asks the FCC to obey its statutory mandates and to enforce the law. Commenters who argue that the Commission should refrain from regulating ITSPs' provisioning of basic service over the Internet are engaging in a policy debate. ACTA

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[15] *City Surrenders to £499m Gangs*, The Sunday Times, June 2, 1996, at A1.

[16] It is evident that suggestions that it is impossible to "regulate" the Internet, or to enforce any regulations that are attempted, are based on wishful thinking, rather than reality. No matter how complex the technology, or what difficulties may exist in enforcing requirements, the duty to advance the public interest remains paramount. A civilized society would not be possible if the determination whether to enact laws depended upon the ease of their enforcement.

[17] *Slaying the Internet Beast*, Telecommunications Week International, March 18, 1996, at 9.

[18] *Only Disconnect*. The Economist, May 11, 1996, at 60.

could respond by suggesting that if the Commission refrains from regulating ITSPs, then the Commission should also refrain from regulating traditional telecommunications carriers. However, that would not be a responsible policy decision and ACTA would not anticipate such a decision from the Commission. Rather, these new telecommunications providers should be brought into the infrastructure framework and should, like all other carriers, support the maintenance and growth of that infrastructure.

C. INDUSTRY SUPPORT FOR ACTA'S PETITION

Commenters from the telecommunications industry weighed in with their support for ACTA's petition. RBOCs, including Southwestern Bell and PacBell, supported ACTA's contention that pricing inequities resulting from a misapplication of the ESP exemption have given ITSPs an unfair competitive advantage in the market.[19] The RBOCs maintain that the ESP exemption was not intended to apply to the provisioning of basic service. Therefore, those who provide interstate voice telecommunications services should pay access charges. Further, the RBOCs contend that the original purpose of the ESP exemption--to foster the development of an infant industry--has vanished. With AT&T, Microsoft and MCI offering enhanced services and the U.S. enhanced services market generating $17.4 billion[20] in 1995, it is difficult to suggest that enhanced services still require "infant industry" protection.

The United States Telephone Association's ("USTA's") comments also supported ACTA's contention concerning the ESP exemption and the inequities created by ITSPs' non-payment of

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[19] *See* initial comments of Southwestern Bell Telephone Company, at 2; *see also* initial comments of Pacific Bell and Nevada Bell, at 8-9.

[20] *See* initial comments of Southwestern Bell Telephone Company, at 6-7.

access charges. USTA stressed that the ESP exemption, when granted by the Commission, was "temporary" in nature.[21] USTA's comments highlighted the maturation of the enhanced services market and the explosive growth of Internet usage and on-line services. USTA also pointed out (and ACTA reemphasizes here) that ITSPs use the public switched telephone network to offer long distance voice service. Internet phone calls are not transmitted exclusively over private networks. To the contrary, the large majority of Internet access is on a "dial-up" basis. Likewise, Internet telephony software facilitates the transmission of voice communications--not data or video--which do not fall nor should be permitted to fall within the ambit of the ESP or any other exemption from public interest responsibilities. The Commission has jurisdiction over both the basic and enhanced services offered by ITSPs and any other entities. ACTA has asked the Commission to act in regard to basic services as it is obligated to do and enforce its statute and rules. As to the enhanced services aspects that are also involved, but not the focus of ACTA's petition when filed, the Commission must realize that the time has come to revisit the policies it adopted when the telecommunications world was quite different than it is today or than it will be tomorrow.

D. ACTA'S REQUEST TO THE COMMISSION

A quick exit from the rigors of policy development presents itself and many powerful voices strongly have and will urge the Commission to delay any action. This would be totally unwise policy and an abdication of the Commission's statutory responsibilities (the "ostrich" approach to policy development). A delayed decision will be a non-decision. Policy development delayed is public interest be damned. ACTA has presented more than convincing proof taken

[21] *See* initial comments of United States Telephone Association, at 2.

almost daily from news reports and industry announcements that Internet telephony and usage patterns are and will continue to seriously impact and burden the traditional infrastructure to the ultimate detriment of the vast majority of those who must rely on the traditional infrastructure, as well as raise new concerns about privacy, cyberspace lawlessness, and national security. PacBell's evidence that the growing habit of Internet users' "nailing-up"--staying on line for hours at a time--places demands on the traditional infrastructure that it was not designed to accommodate.[22] Likewise, an explosion of telephone traffic over the Internet ensures an even more rapid Internet meltdown. Neither the maintenance of the traditional infrastructure nor the development of the Internet are served if these realities continue to be ignored.[23]

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[22] *See* initial comments of PacBell and Nevada Bell, at iii. PacBell has announced its offering of Internet access. Some are sure to argue that PacBell's actions undercut its position of concern over the impact of Internet usage on its traditional services. ACTA would agree that PacBell's announcement and its concerns expressed in its comments are at odds. But the conclusion to be drawn from such an observation is not that the Commission should take no action. Rather, the real message should be abundantly clear. Despite the economic consequences of Internet usage to the traditional infrastructure, popular demand being perceived to be so strong will force the incumbent carriers to react in uneconomical ways. When this happens, the danger to the public and universal service are seriously increased. Can anyone really accept as consistent with the public interest, much less rationality, that AT&T's approach to Internet telephony's threat to drain revenues from traditional services is to "cannibalize its own revenues" AT&T may have supplied a partial answer. *See infra* note 21.

[23] AT&T's initial comments suggest that while a problem exists, it need not be addressed immediately. *See* initial comments of AT&T Corp., at 5-7. This position is not supported by other representatives of the incumbent industry. Perhaps, AT&T's public nonchalance is better understood as revealed in the full page ad published in the Wall Street Journal on May 29, 1996, at B9. In the exceedingly fine print at the bottom of the ad, AT&T announced that "Local, long distance or 800 facility access charges to reach AT&T WorldNet Service and additional access charges or taxes . . . will apply to all usage." Further, AT&T's fine print announced, "Unlimited usage offers limited to one log-on per account any time." AT&T's announcement appears to be saying that it will charge something in the nature of 12 cents a minute to Internet users to recoup its access costs. To this extent, one might assume that part of the free ride for AT&T Internet users appears to be over. At the same time, AT&T's position may actually encourage "nailing-up," causing even greater distortion of cost burdens from Internet usage. The Commission might

If the Commission considers refraining from regulating ITSPs, it must confront the Supreme Court's decision in MCI Telecommunications Corporation v. American Telephone & Telegraph Company, 114 S.Ct. 2223; 1994 U.S. LEXIS 4639 (1994) ("MCI"). In addressing the Commission's authority to require or permit detariffing, the Supreme Court drew the bright line between the Commission's power to ignore statutory duties in favor of policy shifts believed to better serve an overall statutory mandate and public policy objectives and its duties to abide by statutory directives as devised by Congress. Quoting from its earlier decision in Maislin Industries, Inc. v. Primary Steel, Inc., 497 U.S. 116, 110 S.Ct. 2759 (1990), Justice Scalia wrote:

> 'But our [Supreme Court's] estimations, and the Commission's estimations, of desirable public policy cannot alter the meaning of the Federal Communications Act of 1934. For better or worse, the Act establishes a rate-regulation, filed tariff system for common-carrier communications, and the Commission's desire to "increase competition" cannot provide [it] authority to alter the well-established statutory filed rate requirements,' Maislin, 497 U.S. at 135. As we observed in the context of a dispute over the filed-rate doctrine more than 80 years ago, 'such considerations address themselves to Congress, not to the courts,' Armour Packing, 209 U.S. at 82.

MCI, 114 S.Ct. at __; 1994 U.S. LEXIS 4639, at *28-29 (1994).

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expect some AT&T Internet users to complain when they receive their monthly bills listing access charges, taxes and other charges not even defined by AT&T's advertisements. The public seems unaware of the meaning of AT&T's fine print. In an article on the stock price woes of American On-Line appearing in the Wall Street Journal, June 6, 1996, at C2, the reporter describes AOL's offer of 20 hours of on-line time for $19.50 a month as "not as good as AT&T's offer of **unlimited on-line time** for $19.95 . . . ." (Emphasis added.)

Internet access providers whose market position was quickly eroded by AT&T's sweeping announcement of its entry into Internet access might also question AT&T's motives and tactics in usurping their position. AT&T clearly was unprepared to handle demand (Wall Street Journal, *AT&T's Internet-Access Service Is Born Premature* May 23, 1996 at, B4) and less than forthcoming in revelaing its intent to assess access and other charges in addition to its much "ballyhooed" $19.50 a month pricing. Such tactics could be viewed as anticompetitively predatory and preemptive.

Nothing in 1996 Act permits the Commission to ignore developments that affect the Commission's ability and duty to regulate Internet telephony:

> interstate and foreign commerce in communication . . . so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property. . . . **for the more efficient execution of this policy . . . there is created . . . the Federal Communications Commission . . . which shall execute and enforce the provisions of this chapter.**

47 U.S.C. § 151. (Emphasis added.)

ACTA submits that the Commission must decide and must do so in accordance with the law under its very own statutory mandate. Its decision must be made on the record, explaining the basis for its content and effect and showing the consistency of its determinations with the regulatory imperatives of the 1934 and 1996 Acts.

III. REPLY ARGUMENTS

A. ARGUMENTS THAT ACTA'S PETITION MUST BE DISMISSED ARE WITHOUT MERIT.

1. Assertions That Congress Intended to Exempt the Internet From Regulation Are Incorrect.

Several commenters in this proceeding argued that Congress intended to exempt the Internet from any and all regulation by the Commission through the enactment of the 1996 Act.[24]

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[24] *See, e.g.*, initial comments of Microsoft, at 6-8;initial comments of Information Technology Association of America, at 9; initial comments of VocalTec, at 10; initial comments of Information Technology Industry Council, at 8-9; initial comments of Business Software Alliance, at 6-10; initial comments of Compuserve, at 7-8; initial comments of New Media Coalition for Marketplace Solutions, at 7-9.

In fact, quite the opposite is true. Legislative language that would have exempted the Internet from the Commission's jurisdiction was originally passed by the House and considered by the Senate, but it was later deliberately deleted in conference.[25] Had Congress wished to prohibit the Commission from exercising its statutory authority to regulate telecommunications services over the Internet, or any other medium, such language would have emerged from conference. The software and on-line services industries should not use this proceeding to refight a legislative battle that they unequivocally lost before Congress earlier this year.

2. The Argument That the Commission Is Without Jurisdiction to Regulate Telephony Over the Internet Is Wrong.

Those who mistakenly argue that the 1996 Act places the Internet and the entities exploiting it into an exclusive class that is above the law, also erroneously claim that the Commission is without jurisdiction under the 1934 Act and case law. Specifically, some commenters argue that the Commission has no jurisdiction under the test laid out by the Supreme Court in U.S. v. Southwestern Cable, 392 U.S. 157 (1968). There, the Court held that Section 152(a)[26] of the 1934 Act gave the Commission "ancillary jurisdiction" over new communications

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[25] The language of Section 104(d) that was deleted in conference read:

> (d) FCC REGULATION OF THE INTERNET AND OTHER INTERACTIVE COMPUTER SERVICES PROHIBITED. -- Nothing in this Act shall be construed to grant any jurisdiction or authority to the Commission with respect to content or any other regulation of the Internet or other interactive computer services.

See 141 Cong. Rec. H 9988 (daily ed. October 12, 1995); *see also* S. 652, 104th Cong., 2d Sess. (1996).

[26] Section 152(a) of the 1934 Act says, "The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio . . ." 47 U.S.C. § 152(a).

technologies if: 1) such jurisdiction is "restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of [the entities concerned] . . . as public convenience, interest or necessity requires";[27] 2) such jurisdiction is not inconsistent with the law;[28] and 3) there is no compelling evidence that Congress intended to restrict the agency's jurisdiction over the activities concerned.[29] As thoroughly outlined in ACTA's initial comments, not only does the Commission have jurisdiction over matters affecting the nation's telecommunications infrastructure, including voice telephony over the Internet or any other public network, but it has a duty to protect the system that provides basic telephone service as well.[30] With the future health and well-being of the telecommunications infrastructure at peril,[31] such an urgent situation meets the "public convenience, interest, or necessity" prong of the Southwestern Cable decision. Similarly, as stated previously, asserting such jurisdiction is not inconsistent with the law,[32] thus satisfying the Court's second prong. Lastly, there is no compelling evidence whatsoever that Congress intended to restrict the agency's jurisdiction over the activities concerned. In fact, the legislative history proves the opposite. Accordingly, the calls for ACTA's petition to be dismissed ring hollow and must be ignored.

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[27] Southwestern Cable, 392 U.S. at 177-78

[28] Id.

[29] Id.

[30] *See* initial comments of ACTA at 15-22

[31] *See* initial comments of ACTA at 24-28

[32] *See* 47 U.S.C. § 151. The 1996 Act does not diminish the Commission's jurisdiction in this regard. Any argument to the contrary is without merit and self-serving.

B. THE FCC'S OBLIGATION TO ENFORCE THE LAW

ACTA's petition raises two fundamental questions - one of law and one of policy. In seeking the Commission's issuance of a cease and desist order, ACTA has asked the FCC to enforce the law Congress entrusted it to enforce and to make all providers of telecommunications service obey the same fundamental mandates of the 1934 Act and the 1996 Act. Commenters, even those who support ACTA's more broadly-framed request for relief concerning the future status of the Internet,[33] argued that the Commission should refrain from regulating ITSPs' provisioning of basic service over the Internet. ACTA understands their position, but cannot agree with it.

These commenters are arguing policy - that these providers should not be regulated (a position they undoubtedly would endorse for themselves and one which may well make sense in the not too distant future). ACTA is not engaging in a policy debate. ACTA has demonstrated that entities are holding themselves out to provide telecommunications services for hire by making available and offering to the public-at-large the devices and software needed to make long distance calls. While the transmission facilities are provided by other entities, there is nothing

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[33] *See e.g.*, comments of LDDS/Worldcom at 3-5; PacBell at 3-8. These commenters in their zeal to oppose "regulation," overstate their arguments undercutting the rationale of their position. For example, if such arguments were accepted as PacBell's, that these ITSPs are only software providers, and are not "carriers" because they provide no transmission facilities, it would require that all resellers must also be held non-jurisdictional entities. Switchless resellers do not provide any software, transmission facilities, devices or equipment in rendering service. Hence, if owning or leasing transmission facilities were the sole criteria for determining "carrier status," the vast majority of entities engaged in resale of telecommunications would not be subject to FCC jurisdiction. One result of such an approach would be to require remedial action to compensate all these entities for the cost of regulation over the past decade and the return of any Universal Service Fund contributions made by entities subject to such charges. The law and logic are to the contrary and ACTA seeks only consistent application of both.

distinguishing about that aspect of ITSPs' operations from any of the hundreds of switchless resale carriers currently operating and subject to regulation by the Commission and most states.

Having established the necessary linkage between what ITSPs do and their mode of operation with the jurisdictional predicates for carrier status, the record shows that these entities are not tariffed and do not have a section 214 certificate. Such conduct is in violation of the law, FCC rules and policies, including its resale and pro-competition policies,[34] as well as state laws governing telecommunications service provisioning. Hence, the issue is not whether these entities should be regulated. Constitutional guarantees of equal protection, a simple sense of justice, statutory and universal service imperatives, the proper definition of public interest and common sense requires application of the law and its enforcement until or unless current law is changed or reinterpreted, if the power of such reinterpretation be one the Commission is authorized to exercise by Congress.[35]

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[34] Allowing "software" vendors to "give away" the core product marketed by small resale carriers cannot be understood other than as a retreat from both the resale policy and the policy of promoting fair competition in a market repeatedly characterized as one in need of a "level playing field." Existing resale efforts and competition will be grossly skewed if the market is permitted to be invaded by companies with no obligation to use the present network infrastructure in a manner consistent with network efficiencies and in making use of that infrastructure, without making any, much less a fair contribution to the cost imposed by that usage.

[35] With the example of the NTIA comments as a guide, it appears that from a purely political perspective, the "clout" of the software industry has already prevailed on the policy wonks to adopt the attitude of the monarch in the fairy tale about the Emperor's new clothes and parade down Pennsylvania Avenue in the nude believing that an aloof declaration in favor of inaction is a cloak of ermine fringed policy. Ignoring the ammunition such a position provides to those who support disbanding the NTIA, if not the entire Department of Commerce, ACTA too could suggest equally irresponsible alternatives to the more difficult task of actually having the Commission do the job Congress entrusted it to do. ACTA could suggest equally simplistically that if the Commission refrains from regulating ITSPs, then the Commission should also refrain from regulating traditional telecommunications carriers. However, such an approach will not preserve the infrastructure needed by ACTA's members and all other members of the

IV. CONCLUSION

ACTA's petition is based on a correct reading and application of the law, is right on the facts of the need for immediate action, is fully consistent with established procedural and substantive precedents and is sound as expressing needed and beneficial public policy. All that remains is for the Commission to act according to its statutory mandates, the broadest public interests attainable and established precedents. ACTA urges the Commission to do so at the earliest possible time. ACTA further urges the Commission to heed the warnings of the incumbent carriers for immediate action to revise the access charge regime to make it consistent with today's reality and the coming realities of the future.

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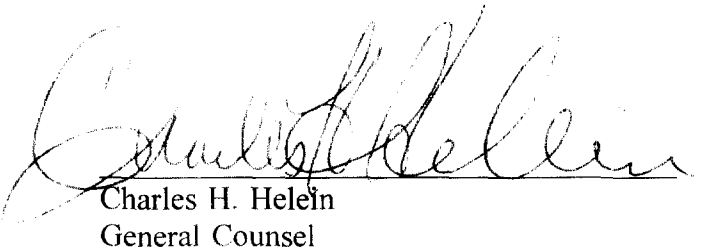
communications community, including ITSPs, to provide their services and wares to the public in a minimally rational marketplace environment. ACTA seeks no such free ride, knowing it will be a cruelly short one. Sane public policy requires a more principled solution. The new telecommunications providers should be brought into the infrastructure framework and should, like all other carriers, support the maintenance and growth of the telecommunications infrastructure. *See*, Wiley and Misener, *Whither Goest NTIA? The Fate of a Federal Telecommunications Agency*, 48 Fed. Comm. L.J. 219 (1996).

Respectfully submitted,
AMERICA'S CARRIERS
TELECOMMUNICATION ASSOCIATION



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CERTIFICATE OF SERVICE

I, Joan Stewart, an employee in the law offices of Helein & Associates, P.C., do hereby state and affirm that copies of the "Reply Comments of America's Carriers Telecommunication Association" in Rulemaking No. 8775, were served in the manner indicated, this 10th day of June 1996, on the following:

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